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A RECENT DECISION OF THE SUPREME COURT UPON MUNICIPAL BONDS.

FOR more than a third of a century, the Supreme Court of the United States, aside from questions of constitutional law, has been dealing with no single class of cases, it is safe to say, of greater moment to the growth and material prosperity of the country than controversies between the holder of a negotiable bond and the State or municipal corporation which, after the security had been put upon the market in its name, has for one reason or another seen fit to deny its validity, and to refuse to pay the indebtedness it purported to secure. The municipal coupon bond, as everybody is aware, has played a conspicuous, one may say indispensable, part in the development of our cities and towns, more especially throughout the West. Coming into use from necessity, it has proved to be an instrument singularly well adapted to take the capital of those who have saved their earnings, and to set it at work in distant localities, where needed to build railroads, bridges, court-houses, school-houses, sewers, water-works, and the like improvements that a rapidly growing community requires. A thousand-dollar bond held by a savings institution has not unfrequently represented the aggregate savings of several depositors, whose small deposits are thus enabled to earn a good rate of interest. It will hardly be denied that this form of security has been a convenient, and upon the whole a safe, means of accomplishing

its twofold object. True, its wide-spread adoption led to some serious abuses, where towns were bonded in aid of railroads, or in a few instances to develop private enterprises; but in the main, the bond itself, as a means of lending capital, has been a blessing alike to the borrower and to all classes of people who sought for their savings a secure investment yielding a good return.

The feeling of confidence that constituted these bonds in the true sense of the word "securities" is largely, if not wholly, due to the attitude towards them taken from the beginning by the Supreme Court of the United States.

The decisions of this tribunal upon the validity of these bonds, beginning with the Commissioners of Knox County (Indiana) *v.* Aspinwall,[1] at the December term, 1858, have been numerous. Indeed, there has scarcely been a term of the court down to the present time that has not witnessed the disposition of one or more causes of the kind, until it would seem as though every possible phase of litigation in this regard had been fully explored. It is hardly needful to add that the system thus gradually developed reflects honor upon American jurisprudence. The opinions of the eminent justices have been pronounced in terms clear and unmistakable; and so far as such a statement can be made without danger of misapprehension, it is to be said that in cases where the regularity of the issue was contested, the court has steadily tended towards upholding the bond. Upon a few points, such as the want of power to issue, and the like, the justices have from time to time divided; but to the extent that the rights of a *bona fide* holder were concerned, or absolute good faith on the part of the nominal debtor required, the views of the court have uniformly been of no uncertain character. Wherever it has found a contract to exist, it has gone to the utmost length to sustain the obligation of it as sacred and inviolable.

There is, and perhaps there always will be, more or less loose talk to be heard through the newspapers in denunciation of "bond-holders," and of the Supreme Court of the United States as favoring that class of creditors. As justly might that august body be accused of favoring "plaintiffs," or favoring "defendants." Judges, of course, have human sympathies. Political questions give birth to public opinion more or less intense throughout the community. Public opinion, we freely concede, may not exist without exerting

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[1] 21 Howard, 539.

some slight degree of influence upon the mind of even the most scrupulous magistrate that holds the scales of justice. But that the highest court in the land has consciously yielded a hair's breadth to other considerations than such as have been addressed in the usual manner at the bar logically to their understandings, is a proposition on its face too absurd to be refuted. As we look back over the record, we can plainly see that the firm moral fibre displayed in the opinions upon bond cases has been of incalculable value to the whole country. Whatever hardship may have resulted from individual decisions, the sum total of the court's labors in this department stands as an enduring monument, for which our people can never be too profoundly grateful.

With these observations premised, let us briefly examine the opinion of the court in a decision rendered at the last term, with a view to ascertain whether there be not just ground for surprise at the line of reasoning there adopted. The case referred to is Merrill *v.* Monticello, decided March 2, 1891, and reported in 138 U. S. 673. The facts are substantially as follows: —

Plaintiff, a citizen of Massachusetts, bought in open market one hundred and forty-three funding bonds of the town of Monticello, Indiana, of $100 each, dated May 20, 1878, payable to bearer ten years from date, with seven per cent. interest per annum, principal and interest payable in New York. The bond recited that it was one of a series of $21,000, authorized by the town by an ordinance passed by the Board of Trustees, May 13, 1878, for the purpose of funding the indebtedness of the town. Coupon numbered two not being paid on presentation, plaintiff, availing himself of the terms of the bond, elected to declare the principal sum due, and brought suit.

The town, May 1, 1869, had issued $20,000 worth of ten per cent. school-bonds, payable in ten years. This amount represented the only debt of the town, and the bonds in suit were issued to take up the school-bonds.

The ordinance, passed after a petition had been presented to the Board of Trustees by the owners of taxable property in the town, was in the following words: —

"That said town issue bonds in the sum of twenty-one thousand dollars, in denominations of one hundred dollars, bearing interest at the rate of seven per centum per annum, payable in gold, to provide the means with which to pay the indebtedness of said town. And be it further

ordained, that when said bonds are issued they be placed in the hands of J. C. W., a member of the Board of Trustees, for negotiation and sale. And be it further ordained, that said bonds shall not be sold at a price less than ninety-four cents on the dollar."

At the date when the bonds in suit were issued, the town treasury had $3,047.85 and no more as a special fund to pay the $20,000 ten per cent. school-bonds then outstanding and about to mature. By law a sufficient sum to pay that indebtedness could not have been raised before their maturity, on the taxable property of the town. The funding bonds were delivered to J. C. W. (a member of the Board of Trustees) for sale. He sold those on which this suit was brought, to a firm in Indianapolis, converted the proceeds to his own use, and fled the country. The town subsequently recovered $6,988.43 from a bank in which J. C. W. had a deposit. It also recovered judgment against the sureties on J. C. W.'s official bond; but the judgment was reversed on appeal, and a new trial ordered. The town later dismissed its suit.

Plaintiff bought his bonds in Boston, as an investment, with no notice of any irregularity as to their issue.

A demurrer to the answer was overruled by Judge Gresham, on the ground that the town had no power to issue bonds to fund its indebtedness.[1]

A demurrer to plaintiff's reply was overruled by Judge Woods, who upheld the validity of the bonds.[2] Upon a trial before the two judges, waiving a jury, judgment was for defendant. No certificate of division was given, but Judge Woods subsequently granted a new trial, it seems, *pro forma*, to allow the case to be taken to the Supreme Court. He filed certain findings of fact, and entered judgment thereon in favor of the defendant. The writ of error was argued before six of the justices in December, 1890, the Chief Justice and Mr. Justice Brewer not sitting. Mr. Justice Brown was not at that date a member of the court.

The opinion by Mr. Justice Lamar delivered, as already stated, March 2, 1891, opens as follows: —

"The decisive question presented by the record in this case is — Did the town of Monticello have authority, under the laws of Indiana, to issue for sale in open market negotiable securities in the forms of the bonds and coupons on which recovery is here sought?"

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1 14 Federal Reporter, 628.

2 22 Federal Reporter, 589.

The opinion then proceeds to speak of the necessity of holding municipal corporations within strict limits of authority, and very properly quotes to that effect from Judge Dillon's work on Municipal Corporations, as well as cites the decision of that able jurist in Gause *v.* Clarksville, 5 Dillon, 165. It quotes extracts from the State statutes, of which the most material is section 27 of the Act of 1852, for the incorporation of towns, being section 3342 of the revised statutes of Indiana, as follows:

"No incorporated town under this Act shall have power to borrow money or incur any debt or liability, unless the citizen-owners of five-eighths of the taxable property of such town, as evidenced by the assessment roll of the preceding year, petition the Board of Trustees to contract such debt or loan; and such petition shall have attached thereto an affidavit verifying the genuineness of the signatures to the same; and for any debt created thereby, the Trustees shall add to the tax duplicate of each year, successively, a levy sufficient to pay the annual interest on such debt or loan, with an addition of not less than five cents on the hundred dollars, to create a sinking fund for the liquidation of the principal thereof."

The learned justice then reaches the conclusion that no "express power is given by these sections, either for the purpose of raising money or funding a previous indebtedness." [1]

Continuing to examine the question whether the bonds were authorized by legislative authority, Mr. Justice Lamar remarks: —

"The town had no power to pay off those bonds in this way, viz., by the issue of new bonds, or it could perpetuate a debt forever. Bonds once issued for a lawful purpose must be paid by taxation. This is manifest from the provision which requires a tax to be levied each year, 'sufficient to pay the annual interest, with an addition of *not less* than five cents on the hundred dollars to create a sinking fund for the liquidation of the principal.' When bonds are once issued for lawful purposes, the town is *functus officio* as to that matter. To argue that the old bonds are a debt for school purposes which may be liquidated by new bonds is a refinement of construction which the sound sense of the law rejects." [2]

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[1] Page 684.

It appears that on the 24th August, 1879, an act went into effect expressly conferring power upon towns to fund their indebtedness by issuing negotiable bonds — a date subsequent to the issue of the bonds in this suit.

[2] Page 685.

This language looks very much like deciding that an express power conferred to issue bonds for the special purpose of building a school-house, or purchasing land for school purposes, does not extend to a funding of the indebtedness thus created, so as to authorize the issue of funding bonds to meet and pay off that indebtedness. But inasmuch as the plaintiff appears to have rested his case mainly upon the broader rights that flow from a power to borrow money, and since the opinion treats this latter position as the turning-point upon which to dispose of the case, it is apparent that the views just presented ought not to be taken as binding the court further than the special circumstances of this case warrant.

The question of the power to issue a funding bond as incident to a power originally conferred to create the debt may thus, we think, be said to remain as yet undecided by the Supreme Court of the United States. As a matter of fact, the point does not appear to have been fully argued or fully considered by the court. Inasmuch as funding bonds in most instances are issued under the authority of a special act of the legislature, or under a general law authorizing towns to fund their indebtedness, the precise question is perhaps not likely to come before the court for determination.

The plaintiff's counsel relied mainly upon an implied authority in the town of Monticello *to borrow money* for meeting its maturing bonds. The existence of such a power, they contended, was settled law in Indiana. They cited Dillon on Municipal Corporations, and, among other authorities, the following language from the opinion of the court in the City of Richmond *v.* McGirr: [1] —

"We think the doctrine is well established in this State, that corporations possess all the necessary incidental powers to carry into full operation all their expressly granted powers, and for such purposes may legally execute commercial paper, such as negotiable bonds, in the absence of any restriction in their charter or fraud in the parties."

Plaintiff also relied upon the principle recognized in Claiborne County *v.* Brooks,[2] as stated by Bradley, J.: —

"It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various polit-

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[1] 78 Ind. 198. [2] 111 U. S. 410.

ical and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State."

Of the soundness of these propositions the court appears to have been fully satisfied. We quote: —

"Section 119, Dillon on Munic. Corp., 3d ed. lays down the Indiana law on this subject substantially as is contended for by the plaintiff in error. That section is as follows: 'In *Indiana*, the doctrine is that corporations, along with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of executing such powers which a natural person may adopt. It is a power incident to corporations, in the absence of positive restriction, to borrow money as means of executing the power.' A large number of cases from the Supreme Court of Indiana is cited in a note to support the doctrine of the text. We think the proposition that, under the laws of Indiana, a town has an implied authority to borrow money or contract a loan, under the conditions and in the manner expressly prescribed, cannot be controverted."[1]

Here is the judicial conclusion that the town of Monticello had the authority *to borrow money*. "But," argues the learned justice, "this only brings us back to the question, Does the implied power to borrow money or contract a loan carry with it a further implication of power to issue funding negotiable bonds for that amount, and sell them in open market as commercial paper? Let us see."[2]

The opinion then proceeds to show that section 3342 is a limitation of the power to borrow money, and that it prescribes certain conditions, one of which is that the prayer of the petition shall be that the Board of Trustees "contract such debt or loan: —

"The board could not depart in its action from this legally required prayer of the petition without transcending its authority and acting *ultra vires*. But the board did depart from the prayer, for it did not borrow money nor contract a loan; but it ordained in so many words that the town issue bonds for negotiation and sale at not less than ninety-four cents on the dollar."[3]

It is to be noted that the third finding of fact sets forth the

[1] Page 686. [2] Page 686. [3] Page 686.

presentation of a petition "praying for the issue of bonds of said town." Then follows the petition *in totidem verbis*.[1] The circumstance is significant as indicating that the court below considered the expressions "to contract a loan" and "to issue bonds" as practically convertible terms. The substitution of one for the other in the finding was probably an inadvertence.

This then appears to be, in the judicial mind, the turning-point of the case. We have the conclusion announced that a power in a town to "borrow money," or to "contract a loan," does not authorize the town to issue its negotiable bonds as a means of getting the money. It is this result which we meant by intimating that the line of reasoning adopted in this opinion might excite surprise. With all deference to so high an authority, we are unable to regard it as a logically sound position.

The usual and customary mode of borrowing money in any considerable sums by municipal corporations has been for years to issue negotiable bonds. Such is the universal understanding, we venture to say, of the business community; and such, so far as we have been able to consult the authorities, has been the construction of the courts. Says the Supreme Court of Indiana, "The issuing and sale of bonds in the market, is the most usual and ordinary method adopted by corporations to borrow money."[2]

So well is this understood that, in a case in Pennsylvania, the court characterized an objection that "to issue bonds" was not "to borrow money" as "a mere quibble in words."[3]

"To borrow money," therefore, is a term that has, through the practice of a long series of years, acquired a a perfectly well-settled meaning. Business men who know from experience the needs of a municipality, and the customary means of conducting its affairs, are not at a loss to understand what is meant by an authority conferred upon a city or town to borrow money, or to contract a loan. Thus far, in the opinion of the distinguished justice, we are afforded no reason whatever why, at this late day, the ordinary

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[1] Page 678.

[2] Thompson *v.* City of Peru, 29 Ind. 305.

[3] Middletown *v.* Alleghany Co., 37 Pa. St. 241.

"To say inferentially that the issuing of bonds was not to borrow money, is to trifle with language which the usages of business have rendered perfectly definite. Everybody knows that when a municipal corporation or a county obtains legislative authority to subscribe for stocks and borrow money to pay therefor, the legislature means that they are to issue a marketable bond in exchange for the stock subscribed." Per Woodward, J.

understanding in such cases should be set aside, and the official action of a board of trustees, which had been taken in good faith and at the request of citizen-owners of five-eighths of the taxable property of the town, should be denied to be, what it is likely everybody supposed it was at the time — a borrowing of money, or the contracting of a loan.

But we may look further on for the reasons on which this position is bottomed. The opinion continues: —

"It is admitted that the power to borrow money, or to incur indebtedness, carries with it the power to issue the usual evidences of indebtedness, by the corporation, to the lender or other creditor. Such evidences may be in the form of promissory notes, warrants, and, perhaps most generally, in that of a bond. But there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale, in open market, a bond, as a commercial security, with immunity, in the hands of a *bona fide* holder for value, from equitable defences. The plaintiff in error contends that there is no legal or substantial difference between the two; that the issuing and disposal of bonds in market, though in common parlance, and sometimes in legislative enactment, called a sale, is not so in fact; and that the so-called purchaser who takes the bond and advances his money for it is actually a lender, as much so as a person who takes a bond payable to him in his own name. We think the case of Police Jury *v.* Britton, 15 Wall. 566, is directly and absolutely conclusive against the position of the plaintiff in error, on this point." [1]

Is there a marked legal difference between the power to give a note to a lender, and the power to issue a bond and sell it in open market? We are inquiring now of the *power* to do these acts, not as to any legal difference that may exist in the respective rights of one who becomes a creditor because he has sold goods to the town, or advanced it money as a loan, — taking a note therefor, — and one who is a creditor because he has bought a bond of the town.

We know nothing of the history of this litigation save as it appears from the record, but upon the first reading of the opinion there was left upon our mind a dissatisfaction, which has only deepened, now that we have come to bestow upon it a closer study. The great ability and the perfect judicial fairness of the

[1] Page 687.

eminent justice who here speaks for the court, render it all the more important that the bar should pass respectful criticism upon the doctrine advanced. This supposed legal difference, upon which Mr. Justice Lamar lays so much stress, was the subject of argument below. The views of the District Judge (Woods) are, in our judgment, so sound, and his reasoning so clearly and forcibly put, that we cannot do better than to quote as follows from his opinion: —

"Having concluded that under the circumstances the town had the right to borrow, we come to the question whether or not the bonds in suit were issued in the lawful exercise of that power. The argument for the defense, as we have seen, turns upon the supposed difference between a power to issue bonds to a lender and a power to issue them for sale in the market. It is conceded, for the purpose of the argument at least, that the power to borrow existed, and that from that an implied power arose to issue negotiable securities to the lender; but it is insisted that this differs essentially from a right to put the bonds of the town upon the market for sale. If there be a difference legally, in what does it consist? When a town would borrow money, how shall it find the lender? Manifestly, from the power to borrow and the implied power to give the ordinary forms of obligations arises the further implication of right to seek the lender; and in the absence of restriction in that respect, to seek him in whatever reasonable manner and place he may be found, whether in the banks, on the boards of trade, or elsewhere. And since, in any case, the town must act by an agent, I see no reason, except of policy not affecting the question of power, why it may not send its agent with bonds duly prepared for delivery, to be disposed of to any who, upon the prescribed terms, will take them. In common parlance, and sometimes in the language of legislative enactment, this is called a *sale;* but it is a misnomer. It is an issue or execution of the bond, and the purchaser (so called) is a lender in fact, since, strictly speaking, a person, or corporation, cannot sell his own obligation. Until delivered to the other party, it is not an obligation, and only when delivered, whether to the highest bidder in open market, or to the taker found in any other way and place, does it become effective and binding; and he who receives it and pays, or rather surrenders, his money for it is a lender, not distinguishable legally from one who takes a bond payable to him in his proper name. Wherefore, as it seems to me, the alleged distinction between the conceded power and the power exercised is not substantial; neither is it justified by the cases cited in support of it." [1]

[1] 22 Federal Reporter, 594.

The decision in Police Jury *v.* Britton was that a power to issue negotiable securities ought not to be implied from a mere authority to make improvements. This is sound doctrine; and it was followed in Claiborne County *v.* Brooks, where it was held that a statute of Tennessee conferring upon counties the power to erect a court-house, jail, and other necessary county buildings, did not authorize the issue of negotiable bonds in payment for the work.[1] The court in these decisions, however, was not dealing with the question of the meaning of the power to *borrow money;* for it expressly denied the existence of such a power. One needs but turn to the report of Police Jury *v.* Britton to perceive that the reasoning of the learned and acute judge who delivered the opinion, is based upon the proposition that there was no power in the police jury to borrow money. Mr. Justice Bradley expressly says: "It has been held that the power to borrow money implies the power to issue the ordinary securities for its repayment, whether in the form of notes, or bonds payable in future."[2] The same eminent justice, in Claiborne Co. *v.* Brooks, says of Lynde *v.* County of Winnebago:[3]—

> "The county had express authority to *borrow money* for the erection of public buildings, to be determined by the people of the county at any regular election, or special election called for the purpose. The question in the case was, not as to the existence of the power, but as to the effect of the evidence on the question whether the conditions for its exercise had been complied with. The court held that the evidence was sufficient, and sustained the bonds. It was not pretended that the county would have had power to issue them if such power had not been conferred by the legislature, either expressly or by necessary implication, from the express power to borrow money."[4]

Mr. Justice Lamar, after citing several decisions and giving extracts from the opinions of the court, sums up by saying: "The logical result of the doctrines announced in the above-cited cases, in our opinion, clearly shows that the bonds sued on in this case are invalid." But an examination of the authorities thus relied upon shows that the court in each instance was passing upon the power to borrow money, and it found that such power did not

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1 111 U. S. 400.
2 15 Wall. 572.
3 16 Wall. 6.
4 111 U. S. 409.

exist. Here the power to borrow money and contract a loan is not denied.

The opinion, repeating what it has previously said, continues: —

> "It does not follow that, because the town of Monticello had the right to contract a loan, it had therefore the right to issue negotiable bonds and put them on the market as evidences of such loan. To borrow money, and to give a bond or obligation therefor which may circulate in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and in their legal effect, essentially different transactions. In the present case all that can be contended for is, that the town had the power to contract a loan under certain specified restrictions and limitations. Nowhere in the statute is there any express power given to issue negotiable bonds as evidence of such loan. Nor can such power be implied, because the existence of it is not necessary to carry out any of the purposes of the municipality." [1]

At last we are given a reason for denying the existence of a power to issue the bonds in question. It is because its existence *is not necessary to carry out any of the purposes of the municipality.* In a subsequent paragraph it is said that such power must be *indispensable* to the exercise of the express or implied powers conferred upon the town by law.[2]

Such a test as this is new, if we mistake not, and goes far beyond what has hitherto been the doctrine of the Supreme Court. Certainly it will be admitted that no one upon the bench has, since the decision in Police Jury *v.* Britton,[3] more firmly and consistently denied to municipal corporations a power to issue negotiable bonds, unless in cases where the authority is beyond question, than the learned justice who wrote the opinion in that case. Yet Mr. Justice Bradley, in 1883, speaking of mere political bodies such as counties constituted for local police and administration, took occasion to remark that they have no power to make or utter commercial paper, "unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, *which cannot fairly be exercised without it.*" [4] And his language is cited with approval by Mr. Justice Lamar.[5]

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[1] Page 691–2.
[2] Page 693.
[3] *Ut sup.* (1872).
[4] Claiborne *v.* Brooks, 111 U. S. 407.
[5] Page 690.

The opinion we are now reviewing does not abide by this just limit. It virtually asserts the doctrine that although there be conferred upon a municipal corporation a power to borrow money, such corporation has no power to raise the money by selling its bonds, because raising money in that way is not necessary to carry out the purpose of borrowing. It is not indispensable to the exercise of the power of contracting a loan that the town should issue bonds. Of this necessity the municipality itself may not judge, but it is left for a court to determine, in an action upon the bonds.

With great respect let it be said, we find ourselves unwilling to believe that the reasoning can be sound which leads to such a result. It is hardly worth while to speculate whether, upon the application of so rigid a rule, the large majority of those familiar with municipal affairs would not be of opinion that under the circumstances in which the town of Monticello found itself, the issuing of its bonds for sale in open market was, as a matter of fact, necessary and indispensable to carry into execution the power that the town had to borrow money. It is of the terms of the rule as a legal proposition, however, not of its application in this particular case, that we complain.

We may be pardoned for suggesting that while the opinion does not directly say so, it yet conveys an impression that to the mind of its writer an implied power to borrow money, or contract a loan, is not quite so plenary in its scope as an authority to do these acts conferred in express words. It is hardly necessary to explain that the only real difference between the two is in the evidence that has satisfied us of the existence of the power. In the one case the legislature says to the town, "You may borrow money." In the other it has used such terms that the court says, "The legislature means that you may borrow." It comes to the same thing. We know of no reason why precisely the same test should not be applied to the power to borrow money, whether the power be express or implied. The true question is, Can a town fairly exercise its power to borrow without resorting to bonds? Inasmuch as negotiable bonds are, and for years have been, the usual and regular mode by which a town raises money that is too large in amount to be got by immediate taxation, there can properly be but one answer to the question. In a word, the

power of a town to borrow once established, its right to issue and sell bonds for a legitimate municipal purpose follows.

Again, although the opinion concedes the existence in Indiana of an implied authority to borrow money, much space is thereafter taken up with demonstrating how salutary is the doctrine that recognizes no such power unless expressly conferred, and how many and great are the dangers that attend a loose construction of the express powers of a municipal corporation.[1]

At page 692, the learned justice quotes at length a passage from Dillon's Municipal Corporations,[2] every word of which is replete with good sense. But the danger against which this admirable writer has sounded a timely warning is of a loose construction that admits of an implied power in a municipal corporation "to borrow money." Judge Dillon says: "We regard as alike unsound and dangerous the doctrine that a public or municipal corporation possesses the *implied power* to borrow money for its ordinary purposes, and *incidental* to that the power to issue commercial securities." Judge Dillon was unquestionably right in long ago taking this stand. It is the implied power to borrow that is dangerous, because, such a power once recognized, the right to issue negotiable securities as incident thereto cannot logically be denied.

In conclusion, we submit that an adequate discussion of the principles governing this case would seem to require the consideration of but two questions only: —

First. — Does the power exist in the municipal corporation to borrow money?

Second. — Has a municipal corporation, which is empowered to borrow money, the right to issue negotiable bonds for funding a valid indebtedness that is about to mature, and which it has not the means to pay, except by borrowing money?

The first question the opinion answers, as we have seen, by determining that the power does exist. After that conclusion is reached, does anything further remain than to inquire into the extent and limits of the power to borrow? And should not that

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1 The reasoning of Mr. Justice Lamar, when scrutinized, is seen to bear exclusively upon the proposition that the power to borrow money cannot be implied from this or that express power. But (and the comment is obvious), that such a power must be necessary in order to be implied will not be disputed.

2 3d ed. sect. 507.

inquiry be free from all consideration of the objections that may be urged against implying the power to borrow, where it does not exist by virtue of express legislative sanction? Pursuing this course, would the court have had any difficulty in determining whether a power in a small town to contract a loan and promptly raise $21,000 could be "fairly exercised" without resorting to the customary methods, and putting its bonds upon the market?

"So far as this case is concerned," say the court in Douglass *v.* County of Pike, speaking through Chief Justice Waite, "we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put upon the market."[1]

Mindful of this just principle, it seems unfortunate, to say the least, that a power upheld without hesitation by the highest court of Indiana, at the time the town of Monticello voted to borrow the means whereby to preserve her credit, should be declared not to have existed, by the Supreme Court of the United States, under a new doctrine; and that the purchaser of these bonds, who had apparently the best of reason to regard them as unimpeachable, is now told that his supposed securities are worthless.

Frank W. Hackett.

WASHINGTON, D. C.

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[1] 101 U. S. 687.